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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 R. ALEXANDER ACOSTA,

11 Plaintiff,

12 v.

13 HOA SALON ROOSEVELT, INC.,
14 et al.,

15 Defendants.

CASE NO. C17-0961JLR

ORDER DENYING
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY
JUDGMENT

16 **I. INTRODUCTION**

17 Before the court is Defendants Hoa Salon Roosevelt, Inc., Hoa Salon Ballard, Inc.,
18 Thuy Michelle Nguyen Pravitz, and Eric Pravitz's (collectively, "Defendants") motion
19 for partial summary judgment. (*See* Mot. (Dkt. # 30).) Defendants argue that Plaintiff R.
20 Alexander Acosta, Secretary of Labor ("the Secretary"), cannot meet his burden of
21 demonstrating that Defendants' alleged Fair Labor Standards Act ("FLSA") violations
22 were willful thereby justifying the imposition of a three-year statute of limitations for

1 willful FLSA violations rather than the presumptive two-year limitations period. (*See*
2 *id.*); *see also* 29 U.S.C. § 255(a). The Secretary opposes Defendants’ motion. (*See* Resp.
3 (Dkt. # 34).) The court has considered the motion, the parties’ submission in support of
4 and opposition to the motion, the relevant portions of the record, and the applicable law.
5 In addition, the court heard counsel’s oral argument on January 23, 2018. Being fully
6 advised, the court DENIES Defendants’ motion.

7 **II. BACKGROUND**

8 **A. Factual Background**

9 Ms. Pravitz owns Hoa Salon Roosevelt and Hoa Salon Ballard. (*See* Am. Compl.
10 (Dkt. # 15) ¶ 6; Answer (Dkt. # 20) ¶ 5 (admitting these allegations).) Mr. Pravitz directs
11 and oversees the operations, pay practices and payroll, terms of employment, and the
12 supervisors and managers at both salons. (*See id.*)

13 Mr. Pravitz testifies that when he and Ms. Pravitz opened their first nail salon, Hoa
14 Salon Roosevelt, they were trying to change the practices they saw in other nail salons
15 where employees were accustomed to irregular payment methods with a mix of payroll
16 checks and cash. (Daquiz Decl. (Dkt. # 35) ¶ 3, Ex. 4 (“E. Pravitz Dep.”) at 17:11-16.)
17 Mr. Pravitz testifies that he and Ms. Pravitz were trying to set up “a normalized
18 employment system” to ensure that employees were paying towards Social Security and
19 payroll taxes. (*Id.* at 17:14-20.) Indeed, as a part of this process, Mr. Pravitz drafted
20 employment letters for Hoa Salon employees, which outlined the terms of employment,
21 including the employee’s hourly pay rate, the overtime rate at 1.5 times the hourly rate,
22 the employee’s duties, and information concerning schedules and breaks. (Daquiz Decl.

1 ¶ 5, Ex. 4 (attaching employment letters produced by Defendants); E. Pravtiz Dep. at
2 31:1-18.) Mr. Pravitz testifies that he knew about the minimum wage and the “sick time
3 ordinance that was passed” because this information “was widely available through
4 media.” (E. Pravtiz Dep. at 58:2-10.) However, he also notes that Defendants had been
5 paying employees for their sick time prior to the enactment of new ordinance. (*See id.*)

6 In 2013, the United States Department of Labor (“DOL”) investigated Hoa Salon
7 Roosevelt “as part of an emphasis program focusing on nail salons in the Seattle area.”
8 (Chan Decl. (Dkt. # 36) ¶ 2.) Mr. Pravitz understood that DOL’s investigation of Hoa
9 Salon Roosevelt was “random” and was intended to determine if “Hoa [Salon] Roosevelt
10 was properly compensating its employees for their hours worked.” (E. Pravtiz Decl.
11 (Dkt. # 31) ¶¶ 3-4.) Mr. Pravitz testifies that he and Ms. Pravitz cooperated with DOL’s
12 investigator to their “fullest extent.” (*Id.* ¶ 3.) Mr. Pravitz recalls that the DOL
13 investigator requested, and Defendants provided to her, the Hoa Salon Roosevelt
14 employee work schedules and payroll records for a specified period of time. (*Id.* ¶ 4.)
15 Mr. Pravitz also recalls that the DOL investigator interviewed some of Hoa Salon
16 Roosevelt’s employees. (*Id.*)

17 Mr. Pravitz and Ms. Pravtiz met with the DOL investigator to discuss the result of
18 the 2013 investigation. (*Id.* ¶ 5.) Mr. Pravitz testifies that the DOL investigator stated
19 that the investigation “had not revealed any wage violations.” (*Id.*) However, Mr.
20 Pravitz also recalls that the investigator suggested one change—that Hoa Salon Roosevelt
21 change its internal payroll records from classifying all employees as “salaried,” and
22

1 | instead classify those employees who were paid by the hour and for overtime as “hourly.”
2 | (*Id.*)

3 | Ultimately, Mr. Pravitz and Ms. Pravtiz made this suggested change, but not until
4 | April 1, 2015. (*See id.*; Daquiz Decl. ¶ 6, Ex. 5 (“Roosevelt Disc. Resp.”) at 3, *Id.* ¶ 7,
5 | Ex. 6 (“Ballard Disc. Resp.”) at 3.) On April 1, 2015, Defendants switched the payroll
6 | systems at both Hoa Salon Roosevelt and Hoa Salon Ballard “to reflect hourly pay rather
7 | than an annual salary.” (Roosevelt Disc. Resp. at 3; Ballard Disc. Resp. at 3.) Prior to
8 | this change, Hoa Salon employees were paid twice a month on the 5th and 20th of each
9 | month. (*Id.*) Mr. Pravitz explained that he initially used a “salary” payroll system
10 | because that was the type of system with which he was familiar, and he used his own
11 | experience as his model. (E. Pravitz Dep. at 17:3-20.) Nevertheless, Defendants’ initial
12 | payroll system calculated overtime hours that employees worked in excess of 87 hours
13 | for each bi-monthly payroll period at 1.5 times the base hourly rate. (Roosevelt Disc.
14 | Resp. at 3; Ballard Disc. Resp. at 3.) Defendants entered employees’ overtime hours into
15 | the payroll system under the category “Bonus.” (*Id.*) Thus, although Defendants initially
16 | categorized employees as “salary,” the payroll system nevertheless accounted for
17 | overtime payments.¹ (*See id.*)

18 | Based on the testimony of DOL’s former investigator, Sherrie Chan, the
19 | Secretary’s description of DOL’s 2013 investigation of Hoa Salon Roosevelt differs in

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21 | ¹ In addition, Defendants calculated (1) holiday pay at 8 hours of employees’
22 | regular pay rate and entered this pay under the category “Holiday,” and (2) sick pay at the
employees’ regular pay rate and entered this pay under the category “Sick.” (*See*
Roosevelt Disc. Resp. at 3; Ballard Disc. Resp. at 3.)

1 certain ways from Defendants’ recollection. (*Compare* Chan Decl., *with* E. Pravtitz
2 Decl.) For example, although Mr. Pravtitz recalls “that the investigation had not revealed
3 any wage violations” (E. Pravtitz Decl. ¶ 5), Ms. Chan testifies that she “found some
4 instances where employees were not paid overtime,” although Defendants then paid these
5 amounts “immediately” (Chan Decl. ¶ 5). In addition, Ms. Chan recalls that Mr. Pravtitz
6 and Ms. Pravtitz did not maintain employees’ time records showing the start and end of
7 each employee’s shift, and she informed them that they needed to maintain these types of
8 records for two years. (*Id.* ¶¶ 4, 6.) Finally, Ms. Chan testifies that she provided Mr.
9 Pravtitz and Ms. Pravtitz with a variety of FLSA “guidance documents in the form of
10 booklets and pamphlets.” (*Id.* ¶ 7, Exs. A-K.) Mr. Pravtitz makes no mention of
11 receiving any of these documents.² (*See generally* E. Pravtitz Decl.)

12 On June 1, 2016, Defendants made an additional change to their payroll system.
13 (Roosevelt Disc. Resp. at 3; Ballard Disc. Resp. at 3.) They added an “Overtime”
14 category so that they no longer recorded overtime pay in the “Bonus” category. (*Id.*) Mr.
15 Pravtitz explained that he had wanted to make this change when Defendants changed from
16 a “salary” to an “hourly” payroll system, but he had difficulty initially getting his
17 accountant to make this change. (E. Pravtitz Dep. at 54:6-17.) Ultimately, he obtained
18 the ability to make this change in the payroll system himself, and so he did. (*See id.*)

19
20 ² Like Mr. Pravtitz, Ms. Chan recalls discussing how Defendants should change
21 their payroll records “to reflect wages earned by their employees for hourly work instead
22 of as salaried employees to help . . . [ensure] that overtime was accounted for properly.”
(Chan Decl. ¶ 6; *see also* E. Pravtitz Decl. ¶ 5.) As noted above, Defendants made this
change on April 1, 2015. (*See* E. Pravtitz Decl. ¶ 5; Roosevelt Disc. Resp. at 3; Ballard
Disc. Resp. at 3.)

1 In October 2016, DOL initiated another investigation of Defendants’ payroll
2 practices at three related salons—Hoa Salon Roosevelt, Hoa Salon Ballard, and Hoa
3 Salon Madison.¹ (*See* E. Pravtitz Decl. ¶ 6; Walum Decl. (Dkt. # 37) ¶¶ 2-3.) Mr. Pravitz
4 testifies that he and Ms. Pravtitz were confident that they would “again be found in
5 compliance” because he understood that the 2013 investigation “had not revealed any
6 wage violations” and with the exception of the classification change from “salary” to
7 “hourly,” they had been “following the same employee scheduling and payroll
8 practices . . . in place at the time of the July 2013 investigation.” (E. Pravtitz Decl.
9 ¶¶ 5-6.)

10 On October 21, 2016, DOL’s investigator, Katherine Walum, met with Mr. Pravitz
11 and Ms. Pravtitz. (Walum Decl. ¶ 2.) Ms. Walum testifies that at that initial conference,
12 Mr. Pravitz and Ms. Pravtitz told her that their employees were required to be at work
13 from 9:30 a.m. to 7:15 p.m. daily and that they were paid for nine hours of work with 30
14 minutes for lunch deducted. (*Id.*) They further described a “turn-based” system for
15 assigning clients to employees throughout the day. (*Id.*) Ms. Walum further testifies that
16 Mr. Pravitz and Ms. Pravtitz “readily admitted that they did not record breaks on the time
17 sheets,” but that employees could “choose to skip their turn with a client in order to take a
18 break.” (*Id.*) Ms. Walum states that Mr. Pravitz and Ms. Pravtitz were unable to produce
19 any of the time records showing the time at which employees started and ended their

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21 ¹ On November 6, 2018, the court entered a stipulated order dismissing Defendant Hoa
22 Salon Madison, along with Defendants Huyen Nguyen, Thuy Hong, and Lam Huynh, from this
suit. (11/6/18 Order (Dkt. # 28).)

1 shifts because they had not maintained them at either Hoa Salon Roosevelt or Hoa Salon
2 Ballard. (*Id.* ¶ 4.) For Hoa Salon Roosevelt, they provided worksheets with a daily
3 number of hours worked per employee. (*Id.*) For Hoa Salon Ballard, they provided
4 payroll records of paychecks issued and worksheet records of daily hours for a few
5 months. (*Id.*) Mr. Pravitz and Ms. Pravitz explained that they had not maintained the
6 balance of the records because they had sold Hoa Salon Ballard. (*Id.*)

7 Beginning on January 1, 2017, Defendants began calculating employee hours by
8 using seven-day periods, Sunday through Saturday, instead of their previous bi-monthly
9 system based on 87-hour pay periods. (Roosevelt Disc. Resp. at 3; Ballard Disc. Resp. at
10 3.) Under the new system, any hours worked in excess of 40 hours during the seven-day
11 pay period was calculated at 1.5 times the regular pay. (*Id.*) On April 16, 2017,
12 Defendants changed to payday every two weeks from the previous system of twice a
13 month. (*Id.*) The “change to a 7-day pay period (instead of a semi-monthly pay period)
14 coupled with the use of an overtime category to reflect overtime payments allows
15 employees and independent auditors to review pay records against records of hours
16 worked to determine whether or not the employees were being properly compensated for
17 overtime hours.” (Walum Decl. ¶ 5.)

18 **B. Procedural Background**

19 The Secretary filed suit against Defendants on June 22, 2017, alleging a variety of
20 FLSA violations, and filed an amended complaint on September 26, 2017. (*See* Compl.
21 (Dkt. # 1); Am. Compl.) The Secretary alleges that Defendants violated recordkeeping,
22 overtime, and minimum wage provision of the FLSA. (Am. Compl. ¶¶ 15-17 (citing 29

1 U.S.C. §§ 206, 207, 211(c), 215(a)(2), 215(a)(5)).) In both his original and amended
2 complaints, the Secretary specifically alleges that Defendants violated the FLSA
3 “willfully.” (Compl. ¶ 18; Am. Compl. ¶ 18.) The Secretary claims Defendants owe
4 current and former Hoa Salon Roosevelt and Hoa Salon Ballard employees at least
5 \$137,603.59 in damages over a three-year liability period for willful violations of the
6 FLSA, plus an equal amount in liquidated damages. (Martin Decl. (Dkt. # 32) ¶ 2, Ex. A
7 (“Plf. Initial Discl.”) at 4.) Defendants expressly deny the Secretary’s allegation that any
8 the alleged FLSA violations were willful. (Answer ¶ 17.)

9 On October 23, 2017, the Secretary produced his initial disclosures pursuant to
10 Federal Rule of Civil Procedure 26(a)(1)(A). (*See* Plf. Initial Discl.); *see also* Fed. R.
11 Civ. P. 26(a)(1)(A). The Secretary did not disclose Ms. Chan, DOL’s 2013 investigator,
12 as a potential witness in his initial disclosures. (*See generally* Plf. Initial Discl.) The
13 Secretary also did not disclose any documents arising out of DOL’s 2013 investigation of
14 Hoa Salon Roosevelt. (*See id.*)

15 On February 12, 2018, Hoa Salon Madison propounded interrogatories and
16 requests for production on the Secretary. (Martin Decl. ¶¶ 3, 8, Ex. B (attaching a copy
17 of the Secretary’s responses).) Those requests sought information and documents related
18 to DOL’s 2013 investigation, including Request for Production (“RFP”) No. 22, which
19 requested the Secretary produce “all documents, communications, or other materials that
20 support your assertion that the claimed wage violations were willful,” and Interrogatory
21 No. 1, which called for the Secretary to identify “each individual who provided
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1 information or materials that you used when responding to these Interrogatories and
2 [RFPs].” (*See id.*)

3 The Secretary served its responses and supplemental responses on March 28,
4 2018, and March 30, 2018, respectively, but those responses do not reference Ms. Chan.
5 (*See generally id.*) Specifically, in response to RFP No. 22, the Secretary stated: “Please
6 see responsive, non-privileged portions of documents marked: DOL 000269-000275[,]
7 DOL 002334-02338.” (*Id.* ¶ 8, Ex. B at 3.) Yet, the Secretary later produced a privilege
8 log indicating that all portions of DOL 000269-000275 and DOL 002334-02338 were
9 privileged. (*Id.* ¶ 8, Ex. C at 8-9.) To date, the Secretary has not produced document
10 numbers DOL 000268-000275. (*Id.* ¶ 4.) In addition, the Secretary’s response to
11 Interrogatory No. 1 does not reference any DOL employee or investigator involved in the
12 2013 investigation. (*Id.* ¶ 8, Ex. B at 2 (referencing only Ms. Walum).)

13 On August 10, 2018, Hoa Salon Roosevelt propounded interrogatories and RFPs
14 to the Secretary. (*See id.* ¶¶ 5, 8, Ex. C.) Defendants again sought information related to
15 DOL’s 2013 investigation. (*See id.*) The Secretary failed to produce timely responses
16 and objections and did not request an extension of time or move for a protective order.
17 (*See id.* ¶ 5; *see generally* Dkt.) The parties held a “meet and confer” telephone
18 discovery conference on September 14, 2018, concerning the Secretary’s late discovery
19 responses. (Martin Decl. ¶ 6.) At this meeting, the Secretary’s counsel agreed to identify
20 the DOL investigators responsible for the 2013 investigation, produce the 2013 DOL
21 investigation file, and provide the discovery responses by September 18, 2018. (*Id.*
22 ¶¶ 6-7.) Despite these representations, the Secretary did not produce these materials until

1 November 2, 2018—just 11 days prior to the court’s dispositive motions deadline and
2 more than two weeks after the October 15, 2018, discovery cut-off. (*See* Mot. at 5;
3 Sched. Order (Dkt. # 17) at 1 (setting the discovery cut-off on October 15, 2018).) Thus,
4 the Secretary did not produce the name of DOL’s 2013 investigator, Ms. Chan, or DOL’s
5 investigation file until well after the close of the discovery period.

6 On November 11, 2016, Defendants filed the present motion for partial summary
7 judgment. (*See* Mot.) In their motion, Defendants argue that the Secretary cannot meet
8 his burden of demonstrating that their alleged FLSA violations were willful. (*See*
9 *generally id.*) Accordingly, Defendants argue that the court should grant partial summary
10 judgment in their favor on that issue and apply the presumptive two-year FLSA statute of
11 limitations instead of the three-year limitations period that applies only in the case of
12 willful FLSA violations. (*See id.*); *see also* 29 U.S.C. § 255(a).

13 In his response to Defendants’ motion, the Secretary does not contest Defendants’
14 description of the course of discovery set forth above. (*See generally* Resp.) Instead, the
15 Secretary contends—without explanation—that the foregoing discovery issues “are
16 irrelevant to the question of whether Defendants’ [FLSA] violations . . . were willful.”
17 (Resp. at 2 n.1.) The Secretary further declares that he “does not intend to call . . . [Ms.]
18 Chan in the trial . . . and does not need her testimony to prove that Defendants’ [FLSA]
19 violations were willful.” (*Id.*) Despite the Secretary’s contention that Ms. Chan’s
20 testimony is not needed, he nevertheless—again without explanation—relies upon her
21 testimony extensively to rebut Defendants’ motion for partial summary judgment on the
22 issue of willfulness. (*See* Resp. at 3-6, 11-13 nn. 9-17, 20, 49-52.)

1 The court now considers Defendants' motion.

2 III. ANALYSIS

3 A. Summary Judgment Standard

4 Summary judgment is appropriate when the moving party "shows that there is no
5 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
6 of law." Fed. R. Civ. P. 56(a). "A party may move for summary judgment, identifying
7 each claim . . . or the part of each claim . . . on which summary judgment is sought. *Id.*
8 In summary judgment practice, "[t]he moving party initially bears the burden of proving
9 the absence of a genuine issue of material fact." *In re Oracle Corp. Sec. Litig.*, 627 F.3d
10 376, 387 (9th Cir. 2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The
11 moving party may accomplish this by "citing to particular parts of materials in the record,
12 including depositions, documents, electronically stored information, affidavits or
13 declarations, stipulations (including those made for purposes of the motion only),
14 admissions, interrogatory answers, or other materials" or by showing that such materials
15 "do not establish the absence or presence of a genuine dispute, or that an adverse party
16 cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

17 Where, as here, "the non-moving party bears the burden of proof at trial, the
18 moving party need only prove that there is an absence of evidence to support the
19 non-moving party's case." *In re Oracle Corp.*, 627 F.3d at 387 (citing *Celotex*, 477 U.S.
20 at 325); *see also* Fed. R. Civ. P. 56(c)(1)(B). Indeed, summary judgment should be
21 entered "after adequate time for discovery and upon motion, against a party who fails to
22 make a showing sufficient to establish the existence of an element essential to that party's

1 case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at
2 322. If the moving party meets its initial responsibility, the burden then shifts to the
3 opposing party to establish that a genuine issue as to any material fact actually does exist.
4 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). In
5 attempting to establish the existence of this factual dispute, the opposing party may not
6 rely upon the allegations or denials of its pleadings, but is required to tender evidence of
7 specific facts in the form of affidavits, and/or admissible discovery material, in support of
8 its contention that the dispute exists. *See* Fed. R. Civ. P. 56(c).

9 **B. Chan Declaration**

10 Defendants argue that the Secretary did not timely identify Ms. Chan as a witness
11 in this case or the documents associated with her 2013 investigation of Hoa Salon
12 Roosevelt and, accordingly, the court should strike her declaration and not allow the
13 Secretary to rely upon it in opposing Defendants’ motion for summary judgment. (*See*
14 Mot. at 4-6 (detailing the Secretary’s late disclosure of Ms. Chan and documents related
15 to the 2013 investigation); *see also* Reply (Dkt. # 41) at 2-5 (asking the court to strike
16 Ms. Chan’s declaration).) As noted above, the Secretary relies extensively on Ms.
17 Chan’s declaration to support its contention that Defendants’ alleged FLSA violations
18 were willful. (*See* Resp at 3-6, 11-13 nn. 9-17, 20, 49-52.)

19 The FLSA has a two-year statute of limitations for claims of unpaid minimum or
20 overtime wages unless the employer’s violation was “willful,” in which case the statute
21 of limitations is extended to three years. *See* 29 U.S.C. § 255(a); *Flores v. City of San*
22 *Gabriel*, 824 F.3d 890, 895 (9th Cir. 2016). Here, the Secretary has alleged from the start

1 of this litigation that Defendants’ FLSA violations were willful. (*See* Compl. ¶ 18.) The
2 Secretary “bears the burden of proof on the issue of willfulness for statute of limitations
3 purposes.” *Roces v. Reno Hous. Auth.*, 300 F. Supp. 3d 1172, 1179-80 (D. Nev. 2018),
4 *appeal dismissed*, No. 18-15525, 2018 WL 5754808 (9th Cir. Sept. 25, 2018) (citing
5 *Parada v. Banco Indus. De Venezuela, C.A.*, 753 F.3d 62, 71 (2d Cir. 2014) (citations
6 omitted)).

7 Federal Rule of Civil Procedure 26 requires a party to disclose the identity of each
8 individual with discoverable information (*i.e.*, each potential witness), along with the
9 subjects of that information, and to provide a copy or a description of all documents that
10 the party may use to support its claims or defenses, unless the party intends to use the
11 witness or documents solely for impeachment. *See* Fed. R. Civ. P. 26(a)(1)(A)(i), (ii).
12 Further, Rule 26(e) obligates parties to supplement in a timely manner their Rule 26(a)
13 initial disclosures and discovery responses. Fed. R. Civ. P. 26(e).

14 Because both the Secretary’s June 22, 2017, complaint and the Secretary’s
15 September 26, 2017, amended complaint contain express allegations that Defendants’
16 FLSA violations were “willful” (Compl. ¶ 18; Am. Compl. ¶ 18), the Secretary was
17 aware at the time counsel prepared the Secretary’s October 23, 2017, Rule 26 initial
18 disclosures that “willfulness”—an issue on which the Secretary bears the burden of
19 proof³—would be an issue at trial. Yet, the Secretary failed to (1) identify Ms. Chan and
20 the subjects on which she had information, and (2) provide a copy or description of
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22 ³ *See Roces*, 300 F. Supp. 3d at 1179-80.

1 documents related to Ms. Chan’s 2013 investigation of Hoa Salon Roosevelt. (*See*
2 *generally* Plf. Initial Discl.) Further, when Defendants later propounded discovery
3 requests to the Secretary that called for this same information, the Secretary failed to
4 timely object or respond. (*See* Martin Decl. ¶¶ 3, 8, Exs. B, C.) Indeed, as noted above,
5 the Secretary did not disclose Ms. Chan’s identity or produce documents related to
6 DOL’s 2013 investigation until two-weeks after the discovery cut-off and only 11 days
7 prior to the dispositive motions deadline. (*See* Mot. at 5; *see also* Sched. Order at 1.)

8 Federal Rule of Civil Procedure 37 “gives teeth” to the Rule 26 disclosure and
9 timely discovery supplementation requirements by forbidding the use “on a motion, at a
10 hearing, or at a trial” of any witness or document that a party failed to properly disclose
11 “unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c); *Yeti*
12 *by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). Rule 37
13 is designed to be self-executing in order to produce a strong incentive to disclose material
14 that the disclosing party would expect to use as evidence whether at trial, at a hearing, or
15 on a motion. Fed. R. Civ. P. 37, Advisory Comm. Note. (1993). The party failing to
16 disclose the required information bears the burden of demonstrating that the party’s
17 failure was either substantially justified or harmless. *See Yeti by Molly*, 259 F.3d at 1107.

18 Here, the Secretary does not dispute Defendants’ account of the Secretary’s failure
19 to disclose Ms. Chan’s identity or the documents related to DOL’s 2013 investigation of

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1 Hoa Salon Roosevelt.⁴ (*See generally* Resp.) Notably, the Secretary makes no effort to
2 demonstrate that his failure to initially disclose Ms. Chan’s identity or produce the
3 subject documents, or to timely supplement his discovery responses to include this
4 information, was either “substantially justified” or “harmless.”⁵ (*See generally id.*); *see*
5 *also* Fed. R. Civ. P. 37(c). The Secretary merely states that he does not intend to call Ms.
6 Chan at trial. (Resp. at 2 n.1.) Yet, Rule 37(c)’s sanction is broader than that—it forbids
7 the use of an undisclosed witness not just at trial, but on a motion or at a hearing, too.
8 *See* Fed. R. Civ. P. 37(c)(1). Indeed, Defendants assert that the Secretary cannot
9 establish that his late disclosure of Ms. Chan’s identity was harmless since Defendants
10 only learned of the significance of her testimony with respect to the issue of willfulness
11 when the Secretary produced her declaration to support its opposition to Defendants’
12 motion. (*See* Reply at 5.) The court agrees. Because the Secretary failed to comply with
13 his Rule 26 initial disclosure and discovery supplementation obligations, *see* Fed. R. Civ.
14 P. 26(a)(1)(A), 26(e), and did not demonstrate that his failure to disclose Ms. Chan’s
15 identity and the documents related to her investigation in a timely manner was
16 “harmless” or “substantially justified,” the court hereby STRIKES Ms. Chan’s
17 declaration pursuant to Rule 37(c)(1) and will not consider it with respect to Defendants’

18 ⁴ Indeed, during the course of oral argument on January 23, 2018, the Secretary’s counsel
19 acknowledged that the Secretary did not disclose Ms. Chan’s identity until after the discovery
20 cut-off.

21 ⁵ During oral argument, the only excuse offered by the Secretary’s counsel for the
22 Secretary’s late discovery responses was counsel’s generally busy schedule. Based on this
representation, the court concludes that the Secretary was not “substantially justified” in failing
to initially disclose Ms. Chan or the subject documents or to timely supplement his discovery
responses. *See* Fed. R. Civ. P. 37(c).

1 motion for partial summary judgment. *See, e.g., Wallace v. USAA Life Gen. Agency, Inc.*,
2 862 F. Supp. 2d 1062, 1064-67 (D. Nev. 2012) (excluding insurer's underwriting
3 witnesses where insurer failed to disclose the witnesses until the insurer moved for
4 summary judgment after the close of discovery and failed to provide any legitimate
5 justification for its failure to timely disclose the witnesses). In addition, the court
6 concludes that the Secretary may not call Ms. Chan as a witness at trial or utilize any
7 other documents related to her 2013 investigation that were produced after the discovery
8 cut-off unless her testimony or those documents are used strictly for purposes of
9 impeachment.⁶ *See* Fed. R. Civ. P. 26(a)(1)(A)(i), (ii).

10 The court now considers whether Defendants are entitled to partial summary
11 judgment on the issue of willfulness or whether the Secretary has raised a genuine dispute
12 of material fact so that the court may submit the issue to the jury.

13 **C. Willfulness**

14 If an employer's conduct embodies a "willful violation" of the FLSA, section
15 255(a) of Title 29 permits the extension of the FLSA's standard two-year statute of
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17 ⁶ Nowhere in the Secretary's briefing does he contend that he did not initially disclose
18 Ms. Chan because he intended to call her solely for impeachment purposes. (*See generally*
19 *Resp.*); *see also* Fed. R. Civ. P. 26(a)(1)(A)(i) (requiring each party to disclose "the name . . . of
20 each individual likely to have discoverable information . . . that the disclosing party may use to
21 support its claims or defenses, unless the use would be solely for impeachment purposes).
22 Nevertheless, during oral argument counsel asserted for the first time that the Secretary did not
initially disclose Ms. Chan and documents related to DOL's 2013 investigation because the
Secretary intended to use this evidence solely for "rebuttal." Based on this representation, the
court will permit the Secretary to utilize Ms. Chan's testimony and the untimely disclosed
documents at trial, but will strictly limit the Secretary's use of this witness and the documents at
issue for impeachment purposes as stated in Rule 26(a)(1)(A). *See* Fed. R. Civ. P.
26(a)(1)(A)(i), (ii).

1 limitations to a three-year period. *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908 (9th Cir. 2003)
2 (citing *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 (1988)); 29 U.S.C. § 255(a).
3 An employer’s violation of the FLSA is “willful” if it is “on notice of its FLSA
4 requirements, yet [takes] no affirmative action to assure compliance with them.” *Alvarez*,
5 339 F.3d at 909. Yet, the mere knowledge that the FLSA is “in the picture” is not enough
6 to sustain a finding of willfulness. *Richland Shoe*, 486 U.S. at 132-33. “A violation is
7 willful if the employer ‘knew or showed reckless disregard for the matter of whether its
8 conduct was prohibited by the [FLSA].’” *Flores*, 824 F.3d at 906 (quoting *Chao v. A-One*
9 *Med. Servs., Inc.*, 346 F.3d 908, 918 (9th Cir. 2003) (alteration in original)); *McLaughlin*,
10 486 U.S. at 133. The Ninth Circuit states that the three-year term “may be applied
11 ‘where the employer disregard[s] the very “possibility” that it was violating the statute.’”
12 *Flores*, 824 F.3d at 906 (quoting *Alvarez*, 339 F.3d at 909). Nevertheless, “merely
13 negligent” conduct will not suffice, *McLaughlin*, 486 U.S. at 133, and a court will not
14 presume that conduct is willful in the absence of evidence, *Alvarez*, 339 F.3d at 909.
15 Further, “[i]f an employer acts unreasonably, but not recklessly, in determining its legal
16 obligation” under the FLSA, its action is not willful. *McLaughlin*, 486 U.S. at 135 n.13.
17 Although whether an employer has acted willfully is a question of fact, the Secretary
18 must present sufficient evidence of willfulness to survive summary judgment. *See*
19 *Pignataro v. Port Auth. of N.Y. & N.J.*, 593 F.3d 265, 273 (3d Cir. 2010) (affirming
20 district court’s summary judgment finding that employer’s violation of the FLSA was not
21 willful).

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1 As noted above, the lion's share of the Secretary's evidence concerning
2 willfulness is based on Ms. Chan's declaration and her 2013 investigation of Hoa Salon
3 Roosevelt. (*See* Resp. at 3-6, 11-13 nn. 9-17, 20, 49-52.) Yet, the court has determined
4 that it will not consider Ms. Chan's declaration for purposes of the present motion. *See*
5 *supra* § III.B. Thus, the only information in the record concerning Ms. Chan's 2013
6 investigation that the court will consider on summary judgment is contained within Mr.
7 Pravitz's declaration. (*See generally* E. Pravtiz Decl.)

8 In his declaration, Mr. Pravitz recounts that it was his "impression [that the DOL
9 investigator] was investigating whether Hoa [Salon] Roosevelt was properly
10 compensating its employees for their hours worked." (*Id.* ¶ 4.) He states that he and Ms.
11 Pravitz "cooperated to [their] fullest extent with the investigator" and "provided the
12 employee schedules and payroll records for a specific period of time." (*Id.* ¶¶ 3-4.) He
13 recalls that the investigator told them "that the investigation had not revealed any wage
14 violations." (*Id.* ¶ 5.) Indeed, absent Ms. Chan's declaration, there is no documentation
15 or other evidence in the record of Defendants receiving any notice that they were in
16 violation of any FLSA provision during or after the 2013 investigation. (*See generally*
17 Dkt.) Nevertheless, Mr. Pravtiz acknowledges that the DOL investigator suggested "one
18 change . . . going forward." (E. Pravtiz Decl. ¶ 5.) Specifically, Mr. Pravitz recalls that
19 the investigator suggested that Hoa Salon Roosevelt "change its internal payroll records
20 from classifying all employees as 'salaried,' and instead classify those employees who
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1 were paid by the hour and for overtime as ‘hourly.’”⁷ (*Id.*) When Mr. Pravitz and Ms.
2 Pravitz learned that they were again the subjects of a DOL investigation in October 2016,
3 they “were confident that [they] would again be found in compliance [because], with the
4 exception of the . . . classification change, [they] had been following the same employee
5 scheduling and payroll practices that [they] had in place at the time of the July 2013
6 investigation.” (E. Pravitz Decl. ¶ 6.) Thus, Defendants argue that the facts surrounding
7 the 2013 investigation actually undercuts the notion that their later alleged violations
8 were willful.

9 Despite Defendants’ characterization of the import of the 2013 investigation, the
10 Ninth Circuit has found that prior FLSA violations are “probative” on the issue of
11 willfulness even if the prior violations are different in kind from the presently alleged
12 violations and the prior violations were not willful. *See Chao*, 346 F.3d at 919. Unlike
13 the circumstances in *Chao*, however, the 2013 investigation of Defendants did not result
14 in any violations and in fact led Defendants to believe that their payroll system complied
15 with the FLSA. (*See* E. Pravitz Decl. ¶¶ 5-6.) Nevertheless, the Secretary asserts that
16 “Defendants’ [sic] misapprehend[ed] the lessons that the 2013 audit should have taught
17 them.” (Resp. at 13.) The Secretary argues that “[i]nstead of being a stamp of approval,”
18 the 2013 investigation should have “put Defendants on notice of the deficiencies of their

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21 ⁷ As noted above, Defendants made this suggested change in April 2015, at both the Hoa
22 Roosevelt Salon and the Hoa Ballard Salon. (*Id.*; *see also* Roosevelt Disc. Resp. at 3; Ballard
Disc. Resp. at 3.)

1 payroll practices and should have resulted in changes to ensure compliance in a timely
2 manner.” (*Id.*)

3 The court agrees with the Secretary insofar as the fact of the 2013 investigation is
4 evidence that the Secretary may rely upon to prove willfulness.⁸ The fact that Defendants
5 were involved in a prior FLSA investigation alone is not proof of willfulness, but it is
6 probative of Defendants’ notice of the FLSA and its requirements. Indeed, in *Chao*, the
7 Ninth Circuit was not merely concerned with the defendant’s prior FLSA violation, but
8 explained that “[t]he fact that [the employer] previously had run-ins with [DOL] certainly
9 put [the employer] on notice of other potential FLSA requirements.” 346 F.3d at 919.
10 Similarly, in *Hodgson v. Cactus Craft of Arizona*, the Ninth Circuit affirmed the district
11 court’s finding that the employer’s FLSA violations were willful in part due to the fact
12 that DOL had previously investigated the employer’s labor practices. 481 F.2d 464, 467
13 (9th Cir. 1973). Viewing the evidence in the light most favorable to the Secretary, the
14 existence of the 2013 investigation weighs against granting Defendants’ motion for
15 partial summary judgment on the issue of willfulness.

16 In addition to the 2013 investigation, as evidence to support the willful nature of
17 Defendants’ FLSA violations, the Secretary also points to (1) Mr. Pravitz’s and Ms.
18 Pravitz’s college level studies in business or business administration, (2) Mr. Pravitz’s
19 extensive prior experiences in both business and government, and (3) Mr. Pravitz’s and
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21 ⁸ The Secretary may rely on the 2013 investigation so long as he does not seek to
22 introduce such evidence through Ms. Chan’s testimony or through documents related to the
investigation that were not timely disclosed. *See supra* § III.B.

1 Ms. Pravitz's stated efforts to improve or "normalize" the employee payment practices
2 they had observed at other nail salons. (*See* Resp. at 10; *see also* E. Pravitz Dep. at
3 8:7-9:24, 10:16-24, 17:11-20; Daquiz Decl. ¶ 4, Ex. 3 ("M. Pravitz Dep.") at 17:11-16.)
4 In other words, the Secretary argues that Mr. Pravitz's and Ms. Pravitz's knowledge and
5 sophistication as employers is evidence of willfulness. Although not dispositive alone,
6 many courts have relied in part on the sophistication of the defendants when considering
7 the element of willfulness. *See, e.g., Kim v. Kum Gang, Inc.*, No. 12 CIV. 6344 MHD,
8 2015 WL 2222438, at *28 (S.D.N.Y. Mar. 19, 2015) (noting among other factors that
9 defendants "ran a large and sophisticated business for many years," and "they themselves
10 professed to be aware of the legal requirements governing minimum wage and
11 overtime"); *Jensen v. Univ. Props., Inc.*, No. 2:05-CV-172 TC, 2007 WL 541812, at *4
12 (D. Utah Jan. 24, 2007) (noting among other factors that the defendant was a
13 "sophisticated and knowledgeable businessman"); *Goudie v. Cable Commc'ns, Inc.*, No.
14 08-CV-507-AC, 2008 WL 4628394, at *9 (D. Or. Oct. 14, 2008) (noting among other
15 factors that the defendant is "a sophisticated commercial entity"); *Chao v. Barbeque*
16 *Ventures, LLC*, 547 F.3d 938, 942 (8th Cir. 2008) (noting among other factors "the
17 sophistication of [the defendant's] senior management"). Accordingly, the court finds
18 that this evidence also weighs against granting Defendants' motion.

19 Finally, during DOL's 2016 investigation of Hoa Salon Roosevelt and Hoa Salon
20 Madison, Defendants "were not able to produce any of the time records showing when
21 employees started their shifts and ended their sheets [sic] because they did not maintain
22 them." (Walum Decl. ¶ 4.) Courts have found willfulness based in part on a defendant's

1 failure to maintain proper records of employees' hours. *See, e.g., Thornton v. Crazy*
2 *Horse, Inc.*, No. 3:06-CV-00251-TMB, 2012 WL 2175753, at *11 (D. Alaska June 14,
3 2012) ("Record keeping was atrocious, management never seemed to make any sincere
4 effort to determine when dancers were coming and going or working or not working.");
5 *Xuan v. Joo Yeon Corp.*, No. 1:12-CV-00032, 2015 WL 8483300, at *5 (D. N. Mar. I.
6 Dec. 9, 2015) (holding that, despite employer's belief he was following the law, his
7 failure to track his employee's hours demonstrated a reckless disregard for the possibility
8 that he might not be in compliance with the FLSA); *Elwell v. Univ. Hosps. Home Care*
9 *Servs.*, 276 F.3d 832, 844 (6th Cir. 2002) ("an employer's recordkeeping practices may
10 nonetheless corroborate . . . claims that the employer acted willfully in failing to
11 compensate for overtime"); *Majchrzak v. Chrysler Credit Corp.*, 537 F. Supp. 33, 36
12 (E.D. Mich. 1981) (finding a willful violation of overtime provisions where the
13 company's policy of not recording "compensation time" earned for working in excess of
14 40 hours per week was "susceptible to abuse and indeed was abused herein"). Thus, this
15 evidence also cuts against granting summary judgment to Defendants on the issue of
16 willfulness.

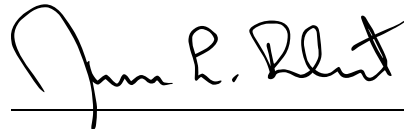
17 In sum, in the absence of Ms. Chan's testimony, the Secretary relies upon the
18 foregoing hodge-podge of evidence to raise a triable issue on the element of willfulness.
19 Construing this evidence in the light most favorable to the Secretary as the court must
20 when considering summary judgment, the court concludes that the Secretary's evidence
21 is sufficient to raise a genuine dispute of material fact concerning the issue of willfulness.
22 *See Fed. R. Civ. P. 56.* As a result, the court DENIES Defendants' motion for partial

1 summary judgment and reserves the issue of willfulness—as it pertains to the statute of
2 limitations found in 29 U.S.C. § 255(a)—for the jury to decide.

3 **IV. CONCLUSION**

4 Based on the foregoing analysis, the court (1) STRIKES the declaration of Ms.
5 Chan and does not consider it for purposes of this motion, and (2) DENIES Defendants’
6 motion for partial summary judgment (Dkt. # 30).

7 Dated this 25th day of January, 2019.

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10 JAMES L. ROBART
11 United States District Judge
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